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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 NATIONAL MECHANICAL
12 SERVICES, INC., a California
13 corporation,

Plaintiff,

14 v.

15 KINSALE INSURANCE COMPANY, an
16 Arkansas corporation; MERCER
17 INSURANCE COMPANY, a
18 Pennsylvania corporation; and DOES 1-
19 50, inclusive,

Defendants.

Case No.: 22-cv-576-CAB-AGS

**ORDER GRANTING DEFENDANT
KINSALE INSURANCE
COMPANY'S MOTION TO DISMISS
THE FIRST AMENDED
COMPLAINT**

[Doc. No. 23]

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21 This matter is before the Court on Defendant Kinsale Insurance Company's
22 ("Kinsale") motion to dismiss Plaintiff National Mechanical Services, Inc.'s ("NMS") first
23 amended complaint ("FAC"). [Doc. No. 23.] The motion has been fully briefed and the
24 Court finds it suitable for determination on the papers submitted and without oral argument.
25 *See* S.D. Cal. CivLR 7.1(d)(1). For the reasons set forth below, Kinsale's motion to dismiss
26 is **GRANTED**.

27 **I. Procedural History**

28 Plaintiff NMS initiated this lawsuit in San Diego Superior Court on March 24, 2022,

1 against Defendants Kinsale and Mercer Insurance Company (“Mercer”). [Doc. No. 1-2.]
2 Mercer removed the matter to federal court on April 25, 2022. [Doc. No. 1.] On August
3 8, 2022, the Court granted Kinsale’s motion to dismiss the complaint, but the Court gave
4 NMS leave to file an amended complaint. [Doc. No. 18.]

5 On August 22, 2022, NMS filed the FAC, which also named Kinsale and Mercer as
6 defendants. [Doc. No. 19.] On August 31, 2022, the Court granted the parties’ joint motion
7 to dismiss Mercer without prejudice, leaving Kinsale as the only defendant. [Doc. No. 20.]
8 Kinsale now moves to dismiss the FAC because NMS’ claims are not ripe and for failure
9 to state a claim. [Doc. No. 23.]

10 **II. Allegations in the Original Complaint**

11 The FAC repeats all of the allegations from the original complaint. Those
12 allegations are summarized in detail in the Court’s dismissal order and will not be repeated
13 at length here. In short, NMS is in the business of maintaining, repairing, and servicing
14 generators in power plants, refineries, and petrochemical plants across the United States.
15 [Doc. No. 19 at 2, ¶ 1.] NMS holds a commercial general liability insurance policy with
16 Kinsale, policy number 0100013169-7 (the “CGL Policy”). [Id. at 2, ¶ 3.] The CGL Policy
17 was in effect from July 21, 2020, to July 21, 2021. [Id.]

18 In May 2021, NMS was hired by Onward Energy (“Onward”) to perform
19 preventative maintenance on three of Onward’s generators. [Id. at 4, ¶ 13.] While NMS
20 was working on Onward’s generators, Onward’s #6 generator was damaged and had to be
21 repaired. [Id. at 6-8, ¶¶ 20-28.] Onward then invoiced NMS for all costs related to
22 repairing the #6 generator from the date of damage up to August 26, 2021, totaling over
23 \$1.35 million. [Id. at 8 ¶ 29, 11 ¶ 36.] NMS believes that Onward’s damages should be
24 covered by the CGL Policy.

25 As detailed in the Court’s prior order, although there was some communication
26 between NMS and Kinsale concerning NMS’ claim for Onward’s damages, NMS alleges
27 that Kinsale rarely returned phone calls and was not as responsive as it should have been.
28 However, in January 2022, a Kinsale representative informed NMS’s owner that “a good

1 chunk of [the claim] looks like it will be covered.” [*Id.* at 12, ¶ 39.] When Kinsale did not
2 follow up with a formal letter agreeing to cover the claim for Onward’s damages, NMS
3 filed this lawsuit on March 24, 2022.

4 The FAC does not add any substantive allegations of events that occurred prior to
5 the initiation of this lawsuit. Rather, all of the new allegations in the FAC concern events
6 that occurred after the complaint was filed, many of which occurred even after the Court
7 dismissed the original complaint. Specifically, on April 1, 2022, Kinsale sent NMS a
8 reservation of rights letter that, among other things, stated that “Kinsale will provide
9 [NMS] with a defense if Onward Energy files a ‘suit.’” [Doc. No. 19 at 176.] Kinsale
10 directed NMS to inform Kinsale if Onward files a suit. [Doc. No. 19 at 13-14, ¶ 44.] On
11 August 12, 2022, despite no suit having been filed by Onward, Kinsale advised NMS that
12 Kinsale had assigned a law firm to represent and defend NMS with respect to the claim
13 concerning Onward’s #6 generator. [Doc. No. 19 at 179.]

14 On August 16, 2022, Onward’s counsel sent a demand letter to NMS for
15 \$1,400,513.14 in damages arising from the incident with the #6 generator. [Doc. No. 19
16 at 183.] The letter stated that the settlement offer would expire on August 19, 2022, and
17 that if NMS did not accept the demand by that date, Onward would “immediately file suit.”
18 [Doc. No. 19 at 183.] NMS forwarded Onward’s demand letter to Kinsale on the day it
19 was received from Onward. [Doc. No. 19 at 185.] NMS filed the FAC on August 22,
20 2022, three days after Onward’s settlement demand expired. The FAC does not allege that
21 Onward had filed suit against NMS.

22 **III. Discussion¹**

23 The Court dismissed the original complaint because the “clear and explicit meaning”
24 of the CGL Policy, “interpreted in [its] ordinary and popular sense” (*Hovannisian v. First*
25 *Am. Title Ins. Co.*, 221 Cal. Rptr. 3d 883, 891-92 (2017)), indicates that Kinsale only has a
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28 ¹ The legal standards set forth in the order dismissing the original complaint [Doc. No. 18 at 4-5] are
equally applicable here.

1 duty to defend NMS against civil lawsuits seeking damages because of “bodily injury or
2 property damage.” [Doc. No. 19 at 37.] At the time the Court dismissed the original
3 complaint, no suit had been filed against NMS. Therefore, at least as of August 8, 2022
4 (the date the Court dismissed the original complaint), Kinsale did not have a duty to defend
5 NMS from Onward’s demands arising out of the incident with the #6 generator. *See*
6 *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 18 Cal. 4th 857, 886 (1998) (“The duty
7 to defend arises when the insured tenders defense of the third party lawsuit to the insurer.
8 Prior to the filing of a complaint, there is nothing for the insured *to tender defense of*, and
9 hence no duty to defend arises.”) (*emphasis* in original; internal citation and quotation
10 marks omitted).

11 Further, because “there is no duty to defend, there *cannot be* a duty to indemnify.”
12 *Certain Underwriters at Lloyd’s of London v. Super. Ct.*, 24 Cal. 4th 945, 958 (2001)
13 (*Powerine*) (*emphasis* in original). Finally, there cannot be a claim for breach of the
14 covenant of good faith and fair dealing in the absence of a duty to defend or duty to
15 indemnify. *See Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995) (“[I]f there is no
16 . . . duty to defend under the terms of the policy, there can be no action for breach of the
17 implied covenant of good faith and fair dealing because the covenant is based on the
18 contractual relationship between the insured and the insurer.”); *see also San Diego Hous.*
19 *Comm'n v. Indus. Indem. Co.*, 68 Cal. App. 4th 526, 544 (1998) (“Where a breach of
20 contract cannot be shown, there is no basis for a finding of breach of the covenant.”).
21 Accordingly, the Court dismissed all of the claims in the original complaint and gave NMS
22 the opportunity to amend the complaint.

23 The FAC does not remedy the primary deficiency that required dismissal of the
24 original complaint—that no suit has been filed against NMS. Thus, for all of the same
25 reasons set forth in the dismissal of the original complaint, the FAC fails to state a ripe
26 claim as well. Neither the new allegations in the FAC, nor the additional allegations
27 asserted in NMS’s opposition brief concerning events that happened after the FAC was
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1 filed² overcome this fatal flaw in NMS’s case. If anything, these new allegations further
2 undermine NMS’s case. Indeed, NMS’s continued dissatisfaction with Kinsale’s handling
3 of this claim to date demonstrates that NMS seeks not to require Kinsale to defend it or
4 indemnify it; rather, NMS seeks to require Kinsale pay Onward for the full amount Onward
5 demands without Onward filing a lawsuit. NMS cites to no authority supporting such a
6 proposition, and the existence of such a duty cannot be reconciled with California law.³

7 **IV. Conclusion**

8 To the extent the FAC seeks a declaratory judgment that based on the current status
9 of events between NMS and Onward, with no lawsuit having been filed against NMS by
10 Onward, Kinsale is required to defend and indemnify NMS, the FAC fails to state a claim
11 because, for all of the reasons set forth herein and in the order dismissing the original
12 complaint: (1) Kinsale cannot have a duty to defend NMS if Onward has not filed suit; (2)
13 without a duty to defend, there is no duty to indemnify; and (3) without a duty to defend or
14 duty to indemnify, there cannot be a breach of the covenant of good faith and fair dealing.

15 To the extent the FAC seeks a declaratory judgment that if Onward sues NMS at
16 some point in the future, Kinsale will be required to defend and indemnify NMS with
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19 ² In its opposition, NMS adds that after receiving Onward’s August 16, 2022, demand letter, Kinsale’s
20 defense counsel in this case emailed Onward’s counsel to advise that Kinsale had “agreed as an
21 accommodation to NMS to provide pre-suit counsel and to reach out in an attempt to resolve this matter
22 short of litigation.” [Doc. No. 25-1 at 59.] The email also stated: “We trust that given the circumstances
23 you will not be filing suit as stated in your letter and will work with [the pre-suit counsel] toward a
24 resolution of your client’s claims if one can be had.” [*Id.*] NMS tries to portray this email to Onward as
25 part of some sort of scheme by Kinsale to obtain dismissal of this coverage lawsuit, and that it has harmed
26 NMS, but that argument does not hold up to scrutiny. Dismissal of this lawsuit ultimately will have no
27 impact on Kinsale’s coverage obligations if Onward actually files suit. On the other hand, if Onward
28 never sues NMS, NMS will never need a defense and never become legally liable for any damages to
Onward for which it would need coverage from Kinsale.

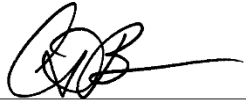
³ NMS does not hide the fact that its desperation for Kinsale to pay Onward everything Onward demands
stems from NMS’s desire for Onward to pay NMS an outstanding invoice totaling \$118,026.75. [Doc.
No. 19 at 9, ¶ 30.] Yet, NMS’s business decision not to pursue litigation against Onward for the amount
of this unpaid invoice does not alter Kinsale’s coverage obligations (if any) to NMS arising out of the #6
generator incident. Likewise, any agreement between Onward and NMS that Kinsale should pay Onward
for the damage to the #6 generator is irrelevant to Kinsale, whose obligations are governed by its contract
with NMS and not by any agreement NMS reaches with Onward.

1 respect to any claims asserted in that lawsuit, the complaint is not ripe because “the
2 determination whether the insurer owes a duty to defend usually is made in the first instance
3 by comparing the allegations of the [underlying] complaint with the terms of the policy.”
4 *Waller*, 11 Cal. 4th 1, 26. Moreover, Onward may never sue NMS, in which case there
5 will never be a duty to defend or indemnify.

6 Accordingly, it is hereby **ORDERED** that Kinsale’s motion to dismiss the FAC is
7 **GRANTED**. Further, because Onward has not filed a lawsuit against NMS, any further
8 amendment would be futile. The FAC is therefore **DISMISSED WITH PREJUDICE**.⁴
9 The Clerk of Court shall **CLOSE** this case.

10 It is **SO ORDERED**.

11 Dated: October 4, 2022

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14 Hon. Cathy Ann Bencivengo
15 United States District Judge
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26 ⁴ To be clear, this dismissal does not preclude NMS from filing a new lawsuit seeking insurance coverage
27 from Kinsale if Onward files a lawsuit against NMS and NMS believes that Kinsale does not comply with
28 its coverage obligations under the CGL Policy with respect to Onward’s lawsuit and the claims asserted
therein. This coverage lawsuit is dismissed with prejudice simply because NMS cannot state a claim for
declaratory relief that Kinsale has a duty to defend or indemnify NMS, or that Kinsale has violated the
covenant of good faith and fair dealing, as things currently stand.